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No. 07-1056

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In The

Supreme Court of the United States

HOZAY ROYAL,

Petitioner,

v.

ROBERT DURISON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a former prisoner who had ample opportunity over the course of sixteen years to challenge his sentence by a direct appeal, by a state court collateral attack, and by a federal court habeas petition can file a § 1983 action to challenge that same sentence, notwithstanding the bars of *Heck v. Humphrey*, issue preclusion, and the statute of limitations.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. 1983-84: Royal's Original Convictions and Sentences	3
1. Sentence One (The "Philadelphia Sentence")	3
2. Sentence Two (The "Montgomery County Sentence")	4
3. Royal Receives An Aggregate Sentence That Combines The Philadelphia Sentence and the Montgomery County Sentence Into One Incarceration Term	4
B. April 1984: Royal Enters State Prison and Realizes He Allegedly Did Not Receive Credit for Time Served. He Does Nothing	4
C. 1999: While On Probation, Royal Is Convicted on a New Set of Charges. The Philadelphia Court of Common Pleas Rules that He Has Violated His Probation and Imposes a 1½ to 3 Year Sentence of Incarceration	5

TABLE OF CONTENTS – Continued

Page

D. 1999: Prior to Sentencing on His Probation Violation, Royal Begins "Thinking" About Addressing Any Alleged Lack of Time Credit. He Waits for a Year and a Half to Raise the Question with the Pennsylvania Courts 7

E. 2000-2002: Royal Files Habeas Petitions in Federal Court 8

F. 1999-2001: Royal Writes to Durison and Asks Durison to Give Him Credit for Time Served in 1983 and 1984 9

G. District Court Opinion 13

H. Court of Appeals Proceedings 14

REASONS FOR DENYING THE PETITION 15

A. *Heck* Bars Royal's Delayed Collateral Attack on His Sentence 15

B. The Circuits Are Not "Split" On the Issue Royal's Case Actually Presents 20

C. Royal's Prior State Court Cases and Habeas Petition Preclude His § 1983 Lawsuit Against Durison 26

D. If Royal's § 1983 Claims Can Be Separated From His Sentence, Those Claims Are Time-Barred Or Simply Lack Merit 31

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Abusaid v. Hillsborough County Bd. of County Commissioners, 405 F.3d 1298 (11th Cir. 2005) 25

Allen v. McCurry, 449 U.S. 90 (1980) 27-30

Aviles v. Department of Corrections, 875 A.2d 1209 (Pa. Commw. Ct. 2005) 11

Bay Area Dry Cleaning & Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192 (1997) 31

Black v. Pennsylvania Dep't of Corrections, 889 A.2d 672 (Pa. Commw. Ct. 2005) 17

Burger King v. WCAB (Boyd), 579 A.2d 1013 (Pa. Commw. Ct. 1990) 29

Carr v. Leary, 167 F.3d 1124 (7th Cir. 1999) 23

Commonwealth v. Bowser, 783 A.2d 348 (Pa. Super. Ct. 2001) 6, 16

Commonwealth v. Hollawell, 604 A.2d 723 (Pa. Super. Ct. 1992) 11

Commonwealth v. Merigris, 681 A.2d 194 (Pa. Super. Ct. 1996) 10, 11

Commonwealth v. Smith, 853 A.2d 1020 (Pa. Super. Ct. 2004) 16

Commonwealth v. Williams, 662 A.2d 658 (Pa. Super. Ct. 1995) 16

DeWalt v. Carter, 224 F.3d 607 (7th Cir. 2000) 24

TABLE OF AUTHORITIES – Continued

Page

Delaware State College v. Ricks, 449 U.S. 250 (1980) 32, 33

Entzi v. Redmann, 485 F.3d 998 (8th Cir. 2007), *cert. denied*, 2008 U.S. Lexis 2873 (Mar. 24, 2008) 22

Figueroa v. Rivera, 147 F.3d 77 (1st Cir. 1998) ... 20, 21

Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005) 21

Guerrero v. Gates, 442 F.3d 697 (9th Cir. 2006) 23, 24

Harden v. Pataki, 320 F.3d 1289 (11th Cir. 2003) 25

Hawkins v. Risley, 984 F.2d 321 (9th Cir. 1993) 30

Heck v. Humphrey, 512 U.S. 477 (1994) ..... *passim*

Heck v. Humphrey, 997 F.2d 355 (7th Cir. 1993), *aff'd on other grounds*, *Heck v. Humphrey*, 512 U.S. 477 (1994) 26

Hoard v. Reddy, 175 F.3d 531 (7th Cir. 1999) 23

Huang v. Johnson, 251 F.3d 65 (2d Cir. 2001) 24, 26

Jones v. Moore, 996 F.2d 943 (8th Cir. 1993) 26, 27

Leather v. Eyck, 180 F.3d 420 (2d Cir. 1999) 26

McCray v. Dep't of Corrections, 872 A.2d 1127 (Pa. 2005) 6, 16, 17

McSpadden v. Department of Corrections, 870 A.2d 975 (Pa. Commw. Ct. 2005) 17

McSpadden v. Department of Corrections, 886 A.2d 321 (Pa. Commw. Ct. 2005) 17

TABLE OF AUTHORITIES – Continued

Page

Migra v. Warren City School District Bd. of Ed., 465 U.S. 75 (1984) 29

Moore v. Tartler, 986 F.2d 682 (3d Cir. 1993) 33, 34

Muhammad v. Close, 540 U.S. 749 (2004) 24

Nance v. Vieregge, 147 F.3d 589 (7th Cir. 1998) 23

Nonette v. Small, 316 F.3d 872 (9th Cir. 2002) 24

Powers v. Hamilton County Public Defender Comm'n, 501 F.3d 592 (6th Cir. 2007) 23, 25

Randell v. Johnson, 227 F.3d 300 (5th Cir. 2000) 22

Royal v. Durison, 319 F. Supp.2d 534 (E.D. Pa. 2004) 2

Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989) 33

Shaffer v. Smith, 673 A.2d 872 (Pa. 1996) 29

Spencer v. Kemna, 523 U.S. 1 (1998) 15, 24, 26

Stone v. Powell, 428 U.S. 465 (1976) 27

United States v. Kubrick, 444 U.S. 111 (1979) 31

Wallace v. Kato, 127 S. Ct. 1091 (2007) 31, 32

Warren v. McCall, 709 F.2d 1183 (7th Cir. 1983) 30

Wilkinson v. Dotson, 544 U.S. 74 (2005) 25

Williams v. Consovoy, 453 F.3d 173 (3d Cir. 2006) 15, 21, 22

Wilson v. Garcia, 471 U.S. 261 (1985) 32

Wilson v. Marrow, 917 A.2d 357 (Pa. Commw. Ct. 2007) 30

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1738 .....2, 28, 29

42 U.S.C. § 1981 .....32, 33

42 U.S.C. § 1983 .....*passim*

18 Pa. Cons. Stat. Ann. § 1103(3).....6

42 Pa. Cons. Stat. Ann. § 5524(2) 32

42 Pa. Cons. Stat. Ann. § 9760(2) 15

42 Pa. Cons. Stat. Ann. § 9771(b) 6

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

In 1984, Hozay Royal learned that he apparently did not receive credit in his criminal sentencing for time he served prior to the imposition of that sentence. Yet Royal waited almost sixteen years to raise the issue with the courts.

Dissatisfied with negative court rulings and prison officials unwilling to take on the role of a court, Royal filed the instant § 1983 action against respondent Robert Durison. Royal now asks this Court to give him yet another chance to lodge a collateral attack on the sentences imposed on him by the Pennsylvania courts.

Royal's alleged lack of access to potential collateral attacks on his sentence is his own fault: to date, no Circuit Court has ruled that a prisoner who can bring a substantive challenge to his sentence through a direct appeal, a state court collateral attack on that sentence, and a federal habeas petition, yet elects to delay any such challenge, should be rewarded afte the fact with the option of a § 1983 suit in federal court.

Furthermore, Royal's petition ignores both this Court's case law regarding the preclusive effect of state court judgments on § 1983 lawsuits and this Court's determination that former prisoners are not exempt from the applicable § 1983 statute of limitations when their claims are indeed separable from their state court convictions and sentences.

Therefore, respondent Robert Durison respectfully requests that this Court deny Hozay Royal's petition to review the judgment of the Court of Appeals of the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the District Court is reported at *Royal v. Durison*, 319 F. Supp.2d 534 (E.D. Pa. 2004).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, this matter also involves Section 1738 of Title 28 of the United States Code. Section 1738 provides in pertinent part:

> The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

A. 1983-84: Royal's Original Convictions and Sentences.

On November 15, 1983, plaintiff Hozay Royal pled guilty to three felony counts of retail theft in the Philadelphia Court of Common Pleas. C. A. App. ("A.") at 34. Prior to his guilty plea, Royal was detained due to a number of pending bench warrants or "detainers" issued by Philadelphia County and nearby Montgomery County. A. at 34, C. A. Supp. App. ("SA.") at 48-49. Royal remained in detention after his guilty plea. A. at 34, SA. at 48-49.

1. Sentence One (The "Philadelphia Sentence").

On January 25, 1984, the Philadelphia Court of Common Pleas sentenced Royal to two to four years in prison on each of the three counts, to run concurrently, and three three-year probation terms, which were to run consecutively. A. at 34, 36, 54.

Therefore, the Philadelphia Sentence was a range of two to four years of incarceration, followed by a nine year probation term. A. at 34, 36.

Royal's contention is that he did not receive approximately 180 days of presentence time credit for time detained while awaiting the Philadelphia Sentence: from March 27, 1983 to April 14, 1983, and from July 30, 1983 to January 25, 1984. SA. at 90.

2. Sentence Two (The "Montgomery County Sentence").

On April 5, 1984, Royal was sentenced for a Montgomery County retail theft conviction. SA. at 79. Royal was sentenced to one and a half to three years of incarceration. SA. at 79-80. This sentence was to be served consecutively to the Philadelphia Sentence. SA. at 79-80.

3. Royal Receives An Aggregate Sentence That Combines The Philadelphia Sentence and the Montgomery County Sentence Into One Incarceration Term.

After the Montgomery County Sentence was imposed, the two sentences were aggregated, which adjusted Royal's minimum and maximum dates of incarceration. SA. at 19, 80. This aggregation resulted in the following sentence:

A three and one half to seven year incarceration term, followed by nine years of probation. SA. at 80.

B. April 1984: Royal Enters State Prison and Realizes He Allegedly Did Not Receive Credit for Time Served. He Does Nothing.

On April 9, 1984, Royal entered the Pennsylvania correctional system to begin serving his aggregate sentence. A. at 35. At his deposition, plaintiff conceded that he first learned of any alleged failure to receive presentence time credit when he entered

SCI-Graterford, a state prison, to begin serving that aggregate sentence. A. at 35, SA. at 22, 24. Despite this knowledge, Royal did not file a Pennsylvania Post-Conviction Hearing Act petition (now known as a Post-Conviction Relief Act or "PCRA" petition); or, for that matter, a § 1983 action. SA. at 15, 79-80.[1]

Royal contends that he was released from prison on January 25, 1988, four years after his original sentencing date. A. at 35. Royal served the remaining three years of parole on his aggregated sentence, and then began to serve his nine-year probationary period. SA. at 80.

C. 1999: While On Probation, Royal Is Convicted on a New Set of Charges. The Philadelphia Court of Common Pleas Rules that He Has Violated His Probation and Imposes a 1½ to 3 Year Sentence of Incarceration.

Royal did not complete all nine years of his probation. While serving his third three-year probation-term, he was arrested once again on new charges and was detained on February 19, 1999. A. at 44-45, SA. at 29. Royal pled guilty to these new charges on September 9, 1999. SA. at 92.

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[1] Royal did not file a direct appeal of any of the 1984 sentences. SA. at 79-80.

After a series of hearings, on October 12, 1999, the Philadelphia Court of Common Pleas found that Royal had violated his probation due to his new conviction. A. at 37, SA. at 80. Royal was sentenced to one and a half to three years of incarceration for violating the terms of his probation. A. at 37.

Under Pennsylvania law, a violation of probation sentence, when combined with the initial sentence, cannot exceed the statutory maximum sentence that could be imposed on that defendant. *See* 42 Pa. Cons. Stat. Ann. § 9771(b) (court has same options when revoking probation as it had at the initial sentencing, with due consideration for time on probation); *McCray v. Dep't of Corrections*, 872 A.2d 1127, 1132 (Pa. 2005) (where revocation of probation sentence, combined with initial sentence, was within statutory maximum for defendant's crimes, sentence was not illegal); *Commonwealth v. Bowser*, 783 A.2d 348, 350-51 (Pa. Super. Ct. 2001) (same).

Royal was serving his last three-year term of probation at the time of the revocation, and the statutory maximum for one count of a third-degree felony is seven years of incarceration. 18 Pa. Cons. Stat. Ann. § 1103(3). The initial Philadelphia Sentence included a two to four year incarceration term. A. at 34, 36, 54. Therefore, on its face, the one and a half to three year probation revocation sentence remained within the seven year limit. A. at 37, SA. at 80.

D. 1999: Prior to Sentencing on His Probation Violation, Royal Begins "Thinking" About Addressing Any Alleged Lack of Time Credit. He Waits for a Year and a Half to Raise the Question with the Pennsylvania Courts.

In April of 1999, at least five months prior to the actual *sentencing* on his probation violation, Royal began "thinking" about addressing any potential failure to receive presentence time credit in 1984. A. at 59. Royal then waited until September of 2000, almost a year and a half later, to raise the issue with the courts.

In September 1999, Royal filed a petition for review in the Pennsylvania Commonwealth Court, in which he challenged his probation violation sentence. SA. at 104. He did not raise any claim in this action regarding failure to receive time credit. SA. at 105. On June 16, 2000, the Commonwealth Court denied and dismissed plaintiff's petition for relief at *Royal v. Pennsylvania Bd. of Probation and Parole*, 507 MD 1999.

Royal filed a direct criminal appeal from the probation violation sentence. SA. at 80. Once again, Royal failed to raise any claim regarding the alleged failure to receive credit for time served, and instead chose to argue that his two sentences had been improperly aggregated, so he should not have received any incarceration term at all. SA. at 80-81. The Pennsylvania Superior Court affirmed the order revoking Royal's probation and imposing a one and a

half to three year sentence on October 13, 2000, at *Commonwealth v. Royal*, 3135 EDA 1999. SA. at 81.

In September 2000, plaintiff filed a PCRA petition where he sought credit for time served from July 30, 1983 to January 25, 1984. SA. at 102. In that petition, Royal made the argument he sets forth in the instant § 1983 action: he claimed that if he did not receive credit for time served prior to the Philadelphia Sentence, he would serve an illegal sentence beyond the maximum incarceration term for his crimes. SA. at 102.

On October 30, 2002, the Common Pleas Court denied Royal's petition as moot given that Royal had been released from prison on February 16, 2002 and had completed his sentence. SA. at 102. Royal appealed to the Pennsylvania Superior Court, which affirmed the denial. SA. at 102-03.

E. 2000-2002: Royal Files Habeas Petitions in Federal Court.

In December 2000, Royal filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. SA. at 81. In that petition, Royal argued that the aggregation of the Philadelphia Sentence and the Montgomery County Sentence was improper, so the imposition of the one and a half to three year violation of probation sentence violated both due process and double jeopardy guarantees. SA. at 80-81, 82-85. The District

Court denied this habeas corpus petition on the merits on February 21, 2002. SA. at 88-89.

Meanwhile, on September 13, 2001, plaintiff attempted to amend his petition to include the PCRA argument (i.e., the argument he later raised in his § 1983 action) that he did not receive credit toward his probation violation sentence for time served prior to the Philadelphia Sentence. SA. at 90. The District Court denied Royal's proposed amendment, and Royal attempted to add this claim once again by filing a motion to alter or amend the judgment, which the District Court also denied on February 22, 2002. SA. at 90-91. The District Court denied Royal's motion on the grounds that the claim had been procedurally defaulted and because Royal's PCRA petition was still pending. SA. at 90-91.

F. 1999-2001: Royal Writes to Durison and Asks Durison to Give Him Credit for Time Served in 1983 and 1984.

Meanwhile, on April 12, 1999, Royal wrote to Robert Durison, Director of Classification, Movement, and Registration for the Philadelphia Prison System, requesting that approximately six months of time that he served prior to the Philadelphia Sentence be credited toward the sentence imposed for his violation of probation in 1999. A. at 52.

Before receiving a response, Royal sent another request to Durison on April 28, 1999. A. at 51. Royal again cited to the three felony convictions that

resulted in the Philadelphia Sentence and claimed that he did not receive time credit for July 1983 to January 25, 1984. A. at 51. Durison considered his request and sent the following response on May 4, 1999: "This is a state parole issue and I doubt that we can confirm any time from that period that wasn't applied to [Royal's] state sentence when he was sent to the SCI." A. at 51. Royal did not receive this response. SA. at 12-13.

In October 1999, Royal sent another letter to Durison from SCI-Camp Hill, another state prison. A. at 49-50. In that letter, he again asked that he receive time credit for six months time served prior to the Philadelphia Sentence in 1984. A. at 49-50.

Upon receiving this letter, Durison again considered Royal's request and personally investigated it. SA. at 84. On November 15, 1999, Durison wrote Royal a letter in which he informed him that the custody records (automated or microfilm) from the relevant time periods in 1983 and 1984 were unavailable, and that the court database was not helpful in researching his request. A. at 47-48, SA. at 84. Durison's review of the court records indicated that Royal's claimed six months of time served could have been applied to four sentences other than the Philadelphia Sentence: 1) the Montgomery County sentence; 2) a county parole back-time sentence; 3) another Philadelphia County criminal case; or 4) a state parole back-time sentence. SA. at 48-49. *See Commonwealth v. Merigris*, 681 A.2d 194, 195 (Pa. Super. Ct. 1996) ("The operative rule . . . is that a

defendant should receive credit only once for time served before sentencing" rather than multiple grants of credit for unrelated sentences); *Commonwealth v. Hollawell*, 604 A.2d 723, 726 (Pa. Super. Ct. 1992) (rejecting an argument to have same period of time credit applied to unrelated sentences, stating, "[t]his court does not deal in 'volume discounts'"). In the absence of custody records from 1983 or 1984, Durison could not recommend to the Department of Corrections to recalculate Royal's incarceration dates to include an extra six months of time served, nor could Durison tell Royal if the time credit had been applied elsewhere in 1983 and 1984. SA. at 48-49.

In the absence of custody records, Durison also informed Royal that, "If there was a consecutive probation on the above case which you are in violation of, the only precommitment credit to which you are entitled is what you already received (i.e.[,] from the time of your last incarceration)."[2] A. at 48.

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[2] Petitioner criticizes this statement, but contrary to his assertions, Durison's presumption that the Department of Corrections would not credit plaintiff for time served if he was serving a consecutive term of probation was proper under Pennsylvania law. If an inmate is serving a consecutive term of probation – i.e., a probation term occurring after incarceration – at the time a violation of probation sentence is imposed, the general presumption is that he has already been credited with time served. *See Aviles v. Department of Corrections*, 875 A.2d 1209, 1213 (Pa. Commw. Ct. 2005) (noting that release from incarceration to a consecutive probation portion of a sentence "only occurs when the preceding total confinement portion of the sentence is satisfied," which is presumed to include credit for

(Continued on following page)

Durison further explained that the Pennsylvania Department of Corrections "would not credit you for any time spent on your prior jail sentence in this case." A. at 48.

Finally, Durison advised Royal to speak with a Records Specialist at Camp Hill prison. A. at 47. Durison also copied the Department of Inmate Records at SCI-Camp Hill on his letter. A. at 48.

Royal received Durison's letter denying his request. SA. at 18, 27-28.

On January 16, 2000, Royal sent Durison another letter making the same request for time served in 1984; his letter included an additional request for time served beginning on February 16, 1999. SA. at 45. Upon reviewing the custody records from 1999, which were available, Durison discovered a discrepancy in the records and determined that Royal should be credited for three additional days of time served, and recommended to SCI-Camp Hill that Royal receive sentence credit for the three days, "if not already applied on another matter." A. at 44-45, SA. at 48.

Royal was sent a carbon copy of Durison's memorandum, although he did not receive it. A. at 44, SA.

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time served). Durison's taking note of such a presumption was appropriate, given that the Philadelphia Sentence, in total, remained within the statutory maximum of 7 years for a third-degree felony: a 2-4 year initial incarceration term and a 1½ to 3 year violation of probation sentence.

at 18, 48. Royal also claims that he sent two additional letters to Durison dated July 28, 2001 and August 27, 2001, reiterating his request for six months of time credit on the Philadelphia Sentence. A. at 40-41, SA. at 46-47. Durison did not receive these letters. SA. at 49.

G. District Court Opinion.

On May 27, 2004, the District Court entered its order and opinion granting Durison's motion for summary judgment. In that opinion, the District Court rejected Royal's Eighth and Fourteenth Amendment claims on the merits. The District Court found that Royal had not shown that any excessive detention was the result of deliberate indifference on Durison's part, because the evidence demonstrated that Durison investigated plaintiff's question and responded within weeks, and re-investigated and notified plaintiff of time credit to which he was entitled when plaintiff made yet another request. Petition App. at 11-16.

Royal filed a motion to alter or amend the judgment on June 7, 2004, which was denied on December 22, 2004. A. at 21. Royal filed a timely notice of appeal on January 4, 2005.

H. Court of Appeals Proceedings.

On April 21, 2005, the Third Circuit Court of Appeals issued an order directing the parties to

address whether *Heck v. Humphrey*, 512 U.S. 477 (1994), barred plaintiff's action. A. at 17. The parties submitted briefs. The Court appointed counsel for Royal on January 19, 2006, and again ordered both parties to brief whether *Heck v. Humphrey* barred Royal's suit.[3]

On November 20, 2007, in a Non-Precedential Opinion, the Third Circuit ruled that Royal's claims were barred by *Heck*. The Third Circuit rejected Royal's claim that his Eighth Amendment rights were violated when he was allegedly "incarcerated for more than six months in excess of the maximum sentence allowed under Pennsylvania law" because the claim attacked his "confinement or its duration," which was barred by *Heck*. Petition App. at 4. The Third Circuit also found that *Heck* precluded Royal's due process claim that Durison had not "meaningfully and expeditiously considered" his allegations of insufficient time credit, because ruling for Royal on that claim would establish that at least part of his violation of probation sentence was invalid. Petition App. at 5. Finally, as for the question that *Heck* should not apply because Royal could no longer file a habeas petition to challenge his incarceration, the Third Circuit noted that the Court had already "expressly

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[3] The parties did not litigate the *Heck* issue in the District Court; rather, the question was litigated at the Third Circuit's request. Interestingly, Royal did not raise any objection to litigation of the *Heck* issues in the Third Circuit, nor does he do so in his petition to this Court.

declined to adopt" such a rule, citing *Williams v. Consovoy*, 453 F.3d 173, 177-78 (3d Cir. 2006). Petition App. at 5-6.

REASONS FOR DENYING THE PETITION

Faced with the bar of *Heck* and his own process of delay, Royal attempts to turn to Circuit Court opinions interpreting the concurring and dissenting opinions in *Spencer v. Kemna*, 523 U.S. 1 (1998), to gain another opportunity to attack his sentence. Petition at 17-22. In support of his arguments, Royal reports that five circuits have endorsed the view point that "the favorable termination rule of *Heck* does not bar § 1983 plaintiffs who cannot pursue habeas corpus." Petition at 17. Unfortunately for Royal, there is *no* Circuit split on the issue that his case actually presents to this Court: no Circuit has allowed a former prisoner to re-litigate his delayed (and failed) attacks on his sentence through a § 1983 action.

A. *Heck* Bars Royal's Delayed Collateral Attack on His Sentence.

First and foremost, this Court should recognize that Royal's § 1983 suit is barred by *Heck* because it is a delayed collateral attack on the sentence imposed on him by the Pennsylvania courts. Royal's argument, in sum, is that he did not receive six months of credit for "time served" that he was due under 42 Pa. Cons. Stat. Ann. § 9760(2), and that, as a result, he served

an illegal sentence of seven years and six months of incarceration, six months more than the seven year statutory maximum for a third-degree felony. Petition at 8-9.

A claim that a defendant did not receive statutorily mandated credit for time served prior to the imposition of a sentence can and should be raised in a direct appeal or in a PCRA petition in the Pennsylvania appellate courts. A defendant can raise a time credit challenge to the initial sentence imposed for an offense, or to a sentence imposed due to a defendant's violation of his probation. *See Commonwealth v. Smith*, 853 A.2d 1020 (Pa. Super. Ct. 2004) (considering a time credit challenge to an initial sentence); *Commonwealth v. Bowser*, 783 A.2d 348 (Pa. Super. Ct. 2001) (evaluating a time credit challenge to a violation of probation sentence).

Furthermore, a trial court's failure to credit a defendant with time served is an error of such magnitude that the challenge is non-waivable: it can be raised with the appellate court on direct appeal in the first instance. *See Commonwealth v. Williams*, 662 A.2d 658, 659 (Pa. Super. Ct. 1995) (considering sentencing credit claim "sua sponte" on appeal from a violation of probation sentence).

Furthermore, the Pennsylvania Supreme Court has held that a prisoner with a time credit claim akin to Royal's *must* challenge that alleged lack of credit through a direct appeal or PCRA petition. In *McCray v. Department of Corrections*, 872 A.2d 1127, 1132 (Pa.

2005), the Pennsylvania Supreme Court held that a defendant who believes that he has not received adequate credit for time served, and therefore has received a violation of probation sentence that exceeds the statutory maximum for his crimes, must bring his challenge through the criminal court process, rather than seek a civil remedy in the first instance.[4] *See id.* at 1132-33 (prisoner should have sought relief before sentencing court for credit for time served, rather than through a civil mandamus action against the Department of Corrections); *see also id.* at 1134-35 (Castille, J., concurring) (any attempt to challenge a failure to credit time served for a violation of probation sentence should be raised through direct criminal appeal or through PCRA petition).

Therefore, what Royal could have done is challenge any alleged failure to receive time credit in 1984, when he first became aware that his sentence was apparently six months longer than it should have been. District Court Judge Robreno so recognized

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[4] Post-*McCray*, a state court mandamus action by an inmate against a prison official for time served can only occur as a means to implement a court order expressly providing for credit for time served. *See, e.g., Black v. Pennsylvania Dep't of Corrections*, 889 A.2d 672, 675-77 (Pa. Commw. Ct. 2005). Royal's citation to *McSpadden v. Department of Corrections*, 870 A.2d 975 (Pa. Commw. Ct. 2005), is therefore inapposite. *See* Petition at 11 n.3; *McSpadden v. Department of Corrections*, 886 A.2d 321, 327-28 (Pa. Commw. Ct. 2005) (noting remand because prior opinion had relied on an interpretation of the law that had been reversed by the Pennsylvania Supreme Court).

when he denied Royal's motion to amend his habeas petition:

> It appears that petitioner may have forfeited any state court opportunity to contest the calculation of credit for a period of time in 1983 and 1984 by not including this claim on a direct or collateral appeal of his 1984 sentenced [sic] in state court. In that instance, the claim would be procedurally defaulted for federal habeas purposes and, as petitioner alleges no cause, prejudice, or miscarriage of justice, consideration of the defaulted claim would be foreclosed in this court.

SA. at 90.

Assuming Royal's claim remained viable over time, Royal also could have challenged the lack of credit once again in 1999, after he received his violation of probation sentence. Instead, Royal made no challenge whatsoever to his sentence in 1984, and he made no argument regarding time credit in his direct appeal from his violation of probation sentence in 1999. In fact, Royal waited until 2000, when he filed his PCRA petition, to raise the issue that he now wants to raise in this § 1983 action against Durison.

The *Heck* bar is particularly apparent where Royal's claims of error as a § 1983 plaintiff mirror his arguments as an aggrieved state court criminal defendant. Royal and his PCRA counsel framed their appellate issue to the Pennsylvania Superior Court as follows:

> Appellant maintains he was not properly credited for time served and in his *pro se* petition declares that he is eligible for relief because he was given a sentence that was greater than the lawful maximum.

SA. at 102 (Superior Court PCRA opinion).

This Superior Court argument reappears (in a number of guises) in Royal's § 1983 action against Durison:

> • Complaint: "Because of [Durison's] inaction to my request the Plaintiff served a sentence beyond the statutory maximum. The Plaintiff is claiming [Durison was] responsible for the Plaintiff having to serve a sentence beyond its term and the statutory maximum." A. at 30;
>
> • July 28, 2001 Letter: "Mr. Durison, my sentence is illegal if I am not given the credit time served." A. at 34, SA. at 43;
>
> • Royal's Deposition: "Hey, I pled guilty to a felony three and the maximum amount of time I could do for a felony three that Judge Maier gave me was seven years[.]" A. at 59;
>
> • Deposition: "[N]ow, when I got to the point of seven years served and I didn't have the commitment credit time, I went beyond the seven years . . . it was mandatory that I have that credit time, according to the statute." A. at 69.

In sum, where Royal had a number of chances to litigate his challenge to his sentence in the state courts and through the vehicle of a federal habeas petition, *Heck* bars his attempt to litigate these questions once again through his § 1983 lawsuit against Durison.

B. The Circuits Are Not "Split" On the Issue Royal's Case Actually Presents.

Royal claims that five circuits have ruled *Heck* does not bar a § 1983 lawsuit if a plaintiff cannot pursue habeas corpus, and that four have ruled that *Heck* does bar such a suit. Petition at 17-25. However, the Circuits are not split on the issue that Royal's case presents: whether a former prisoner can bring a belated collateral attack on a state court's judgment. No Circuit Court has accepted that premise.

In rejecting arguments akin to Royal's, a number of the Circuits have acknowledged both the core holding of *Heck* and the inherent contradiction of allowing a federal tort claim to invalidate a state court criminal conviction or sentence. For example, in *Figueroa v. Rivera*, 147 F.3d 77 (1st Cir. 1998), plaintiffs sought to bring a § 1983 lawsuit on behalf of a relative who had died in prison while a habeas petition was pending; their complaint alleged that their relative had been framed by police officers, "thereby spawning an unconstitutional conviction and sentence." *Id.* at 80. The First Circuit rejected plaintiffs'

argument that their relative's death excepted them from the *Heck* favorable termination requirement because any such exception would run "afoul of *Heck's* core holding: that annulment of the underlying conviction is an element of a section 1983 'unconstitutional conviction' claim." *Id.* at 81.

The First Circuit also reasoned that "[c]reating an equitable exception to this tenet not only would fly in the teeth of *Heck*, but also would contravene the settled rule that a section 1983 claimant bears the burden of proving all the essential elements of her cause of action." *Id.* at 81. As a result, the First Circuit determined that *Heck* barred plaintiffs' unconstitutional conviction and imprisonment claims. *See id.*

Faced with a similar request for an exception in *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), the Third Circuit took note of the principle set forth in *Heck* that a plaintiff should not succeed in a tort action "after having been convicted in the underlying criminal prosecution, which would run counter to the judicial policy against creating two conflicting resolutions from the same transaction." *See id.* at 209, *citing Heck*, 512 U.S. at 484. The Third Circuit therefore concluded that plaintiff's guilty plea or "ARD" (an alternate disposition of the criminal charges) barred his § 1983 claims, lest there be a conflicting state court and federal court judgment on the same set of facts. *See id.* at 210-12; *see also Williams v. Consovoy*, 453 F.3d 173, 177 (3d Cir. 2006) ("In *Gilles* we concluded that *Heck*'s favorable-termination

requirement has not been undermined"); *see also Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007), *cert. denied*, 2008 U.S. Lexis 2873 (Mar. 24, 2008) (concluding that *Heck* rule remained intact, and it would not create a new opportunity for a collateral attack by a former prisoner).

Furthermore, the Circuits have not been willing to create an exception to *Heck* where a plaintiff (like Royal) had other opportunities to challenge a conviction or sentence and failed to use them. For example, in *Randell v. Johnson*, 227 F.3d 300 (5th Cir. 2000), the Fifth Circuit rejected an argument by a plaintiff that because he had been released from custody and could not file a habeas corpus petition, he should be allowed to bring a § 1983 damages action to challenge a failure to receive credit for time served. *See id.* at 300-01. The Fifth Circuit recognized that plaintiff's § 1983 claim would challenge his underlying conviction, and that it was therefore barred by *Heck*'s favorable termination requirement. *Id.* at 301. The Court then rejected plaintiff's "[I] can no longer seek habeas relief" rationale on the basis that a plaintiff who wished to claim that *Heck*'s requirement of favorable termination had been relaxed in some manner would have to demonstrate that he had "no procedural vehicle to challenge [his] conviction" and that plaintiff had "not shown that such a procedural vehicle is lacking; he speaks only of inability to obtain habeas relief." *Id.* at 301.

Although the Seventh Circuit has stated that there is "*probably* an exception to the rule of *Heck* for

cases in which no route other than a damages action under section 1983 is open to the person to challenge his conviction[,]" it has also made plain that where a plaintiff has the option of pursuing a direct appeal or some form of collateral attack in the state courts, his case is barred by *Heck*. *See Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999) (emphasis added); *Nance v. Vieregge*, 147 F.3d 589, 591 (7th Cir. 1998) (where plaintiff had option of seeking a pardon from the governor or a writ of coram nobis, he could not claim an exception from *Heck*'s favorable termination requirement); *cf. Carr v. Leary*, 167 F.3d 1124, 1127-28 (7th Cir. 1999) (plaintiff who lacks option of direct appeal or postconviction proceeding may be able to proceed with a § 1983 lawsuit in federal court, but declining to reach the issue, as defendants had waived any *Heck* defense).

The Sixth Circuit used a similar line of reasoning in *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592 (6th Cir. 2007). In determining whether there might be a *Heck* "exception" for plaintiffs who could not file a habeas petition, the Sixth Circuit determined that a plaintiff would not be "entitled to such an exception if the plaintiff could have sought and obtained habeas review while still in prison but failed to do so." *See id.* at 601. Further, the Ninth Circuit, in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2006), also held that a plaintiff who had access to habeas, yet did not resort to it, could not "now use his 'failure timely to pursue habeas remedies' as a shield

against the implications of *Heck*." *Id.* at 705 (citations omitted).

Moreover, other cases on which Royal relies extend an exception to *Heck* within the context of purely administrative determinations, rather than a challenge to a court order such as a conviction or judgment of sentence. *See Nonette v. Small*, 316 F.3d 872, 878 n.7 (9th Cir. 2002) ("We also emphasize that our holding affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters; the status of prisoners challenging their underlying convictions or sentences does not change upon release, because they continue to be able to petition for a writ of habeas corpus"), *citing Spencer*, 523 U.S. at 7-12; *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (reasoning that plaintiff's challenge could proceed in part because it was addressing an administrative decision directed to the "duration of [her son's] confinement" rather than a challenge to a judicial pronouncement, such as the underlying conviction).

In fact, some of the opinions on which Royal relies do not address claims that would be barred by *Heck* in the first place. *DeWalt v. Carter*, 224 F.3d 607 (7th Cir. 2000), involved a prisoner challenging the conditions of his confinement, rather than the length or duration of that confinement. *See id.* at 613. This Court has already ruled that such claims are cognizable under § 1983. *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (prison disciplinary sanctions that

do not lengthen an inmate's sentence are not barred by *Heck*).

In *Harden v. Pataki*, 320 F.3d 1289 (11th Cir. 2003), the Eleventh Circuit addressed a challenge to the procedures used in plaintiff's criminal case, rather than the actual result: this type of § 1983 claim has been cognizable both pre- and post-*Heck*.[5] *See id.* at 1290; *see also Wilkinson v. Dotson*, 544 U.S. 74, 82-84 (2005); *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 603-04 (6th Cir. 2007) (plaintiff's § 1983 claim was a procedural challenge to Public Defender's practices, and therefore not barred by *Heck*).

Royal's claim of a "five to four" Circuit split does not reflect Circuit authority or the overt respect for state court judgments shown in those opinions. There is no Circuit that has held that a former prisoner who had an opportunity to challenge his sentence in a habeas proceeding but failed to do so can later challenge that sentence in a § 1983 suit once habeas becomes unavailable, and there are four Circuits that have indicated that such a claim does

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[5] Even judges in the Eleventh Circuit have recognized that *Harden* may not have the sweep that Royal wants it to have. In *Abusaid v. Hillsborough County Bd. of County Commissioners*, 405 F.3d 1298, 1315 n.9 (11th Cir. 2005), Eleventh Circuit Judge Marcus stated in dicta that while he would be amenable to creating an exception to *Heck* for plaintiffs for whom habeas is not available, "[o]ur Court has not yet weighed in" on the issue that Royal now wishes to present to this Court.

not lie. Therefore, this Court should deny Royal's petition for certiorari.

C. Royal's Prior State Court Cases and Habeas Petition Preclude His § 1983 Lawsuit Against Durison.

This Court should also deny Royal's petition for certiorari because his § 1983 lawsuit is barred by the doctrine of issue preclusion. Royal litigated the term and length of his sentence on direct appeal to Superior Court, and he lost that challenge. SA. at 80-81. He cannot mount yet another challenge to the legality and length of his violation of probation sentence in the form of a § 1983 action against Durison.

The preclusive effect of Royal's prior state court challenge to his sentence provides another reason for this Court to deny certiorari, because, regardless whether a Circuit accepts or rejects the existence of any *Heck* "exception" under *Spencer v. Kemna*, those same Circuits do accept the applicability of the doctrines of claim and issue preclusion to a former prisoner's § 1983 suit. *See Huang v. Johnson*, 251 F.3d 65, 74-75 (2d Cir. 2001) (if claim and issue preclusion apply to a § 1983 suit, that suit cannot proceed); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (same); *Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993) (stating that if plaintiff's "conviction were proper, this suit would in all likelihood be barred by res judicata"), *aff'd on other grounds*, *Heck v. Humphrey*, 512 U.S. 477 (1994); *see also Jones v.*

Moore, 996 F.2d 943, 945 (8th Cir. 1993) (prior state court action precluded prisoner's § 1983 claims, and "neither the employment of different, previously unadvanced theories of liability nor requests for previously unsought relief arising from [the same] facts will allow [plaintiff] to avoid the bar imposed by his state court action").

This line of Circuit Court case law is in keeping with this Court's dictates. This Court has made plain that a prior state court judgment, such as a criminal judgment or sentence, can have either issue preclusive or claim preclusive effect on a later § 1983 suit.

Indeed, this Court has so held in the face of an argument remarkably similar to Royal's. In *Allen v. McCurry*, 449 U.S. 90 (1980), plaintiff had unsuccessfully raised Fourth and Fourteenth Amendment arguments regarding the suppression of evidence in his criminal case and on direct appeal. *See id.* at 91. Because he was unable to bring a habeas petition to attack these Fourth Amendment rulings under this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), plaintiff claimed he was denied a "full and fair opportunity" to litigate his search and seizure claim, and sought to bring a § 1983 suit against the officers who had entered his home and seized evidence. *See Allen*, 449 U.S. at 91. The Eighth Circuit Court of Appeals concluded that because plaintiff was unable to bring a habeas petition under *Stone v. Powell*, a § 1983 suit was plaintiff's "only route to a federal forum for his constitutional claim" so collateral estoppel did not apply. *See* 449 U.S. at 93.

This Court granted certiorari to consider whether the plaintiff's lack of access to habeas corpus barred defendants from raising a collateral estoppel defense to plaintiff's § 1983 suit against them for damages. *See* 449 U.S. at 91. This Court ruled that the Eighth Circuit erred in holding that the plaintiff's inability to obtain federal habeas corpus relief meant that collateral estoppel did not apply to his § 1983 action:

> The actual basis of the Court of Appeals' holding appears to be a generally framed principle that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises. But the authority for this principle is difficult to discern. It cannot lie in the Constitution, which makes no such guarantee, but leaves the scope of the jurisdiction of the federal district courts to the wisdom of Congress. And no such authority is to be found in § 1983 itself.

Id. at 103.

In so deciding, this Court took note of both the effect of 28 U.S.C. § 1738, in which Congress "specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments entered would do so[,]" as well as the history and text of § 1983. *See id.* at 96, 97-98. In particular, this Court found that "nothing in the language of § 1983 remotely expresses any congressional intent to contravene the

common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738," and that the legislative history did not suggest that Congress "intended to repeal or restrict the traditional doctrines of preclusion." *Id.* at 97-98.

This Court returned to the question of the preclusive effect of state court judgments in *Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75 (1984). In *Migra*, plaintiff did not litigate her § 1983 claim in state court, but had litigated other state law claims pertaining to the same facts; she argued that state court judgments should only have preclusive effect as to issues actually litigated in state court. *See id.* at 83. This Court once again affirmed the principle that "Section 1983 . . . does not override state preclusion law" and that § 1983 did not "guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 85. This Court held that the state court judgment should be given claim preclusive effect in federal court. *See id.* at 86.

In Pennsylvania, a criminal judgment against a defendant has a collateral estoppel effect on a later civil proceeding. *See Shaffer v. Smith*, 673 A.2d 872, 874-75 (Pa. 1996) (criminal conviction had collateral estoppel effect on facts and conduct in a subsequent civil trial); *Burger King v. WCAB (Boyd)*, 579 A.2d 1013 (Pa. Commw. Ct. 1990) (rule of conclusive effect of prior convictions extends to proceedings before an

administrative agency). That is, if that defendant's lawsuit can be filed at all. *See Wilson v. Marrow*, 917 A.2d 357, 362-63 (Pa. Commw. Ct. 2007) (plaintiff could not bring § 1983 lawsuit against Parole Board employees where he had already challenged the Parole Board's action in a revocation action and habeas proceeding). The Superior Court's decision affirming Royal's sentence would have preclusive effect in civil proceedings in the Pennsylvania state courts. It should have the same preclusive effect on Royal's § 1983 action. *See Allen*, 449 U.S. at 103-04.

Royal's § 1983 lawsuit is also barred as a matter of federal common law. Royal litigated the term and length of his sentence in his District Court habeas proceeding as well, and he made constitutional challenges to that sentence in the process. SA. at 80-81, 88-90. The District Court denied his petition on the merits. SA. at 80-81, 88-90. Where the fact and length of Royal's sentence were front and center in his habeas petition, and determined on the merits by a District Court, he cannot bring a § 1983 proceeding against Durison to argue once again that the fact and length of his sentence were wrong, and his sentence really should have been six months shorter than it was. *See, e.g., Hawkins v. Risley*, 984 F.2d 321, 323-24 (9th Cir. 1993) (prior habeas proceeding precluded § 1983 claims on same set of facts against individual defendants from Board of Pardons and prison system); *Warren v. McCall*, 709 F.2d 1183, 1183-85 (7th Cir. 1983) (prior habeas proceeding

precluded subsequent § 1983 suit against parole commission and prison officials).

Therefore, this Court's opinions in *Allen* and *Migra*, as well as Circuit court case law on issue preclusion direct that Royal's petition be denied.

D. If Royal's § 1983 Claims Can Be Separated From His Sentence, Those Claims Are Time-Barred Or Simply Lack Merit.

Royal's case also does not warrant certiorari review because even if his claims were separable from his sentence, he did not file those claims within the applicable statute of limitations. Recently, in *Wallace v. Kato*, 127 S. Ct. 1091 (2007), this Court made plain that the *Heck* deferred accrual rule only applies to § 1983 actions that would impugn an existing criminal judgment; in such cases, the statute of limitations begins to run when (and if) an extant conviction is set aside. *See id.* at 1097-98. Otherwise, the standard rule is that the statute of limitations for a § 1983 lawsuit begins to accrue at the time when "'the plaintiff can file suit and obtain relief.'" *Id.* at 1095, *quoting Bay Area Dry Cleaning & Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997); *see also United States v. Kubrick*, 444 U.S. 111, 122-24 (1979) (FTCA two-year statute of limitations begins to accrue when plaintiff knows of existence and cause of injury).

Section 1983 claims are governed by the relevant state's personal injury statute of limitations; Pennsylvania's statute of limitations for such actions is two years. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985); 42 Pa. Cons. Stat. Ann. § 5524(2). Royal admitted in his deposition that in 1984 he became aware that he had not received presentence time credit. SA. at 25. This was sufficient notice for him to begin investigating any potential § 1983 claims, and his complaint therefore should have been filed by 1986. SA. at 25. Instead, he did not file his complaint until July of 2003. A. at 18.

Royal cannot rescind the time bar on his claims by arguing that they did not begin to accrue until after he began to serve "excess" time on his seven year sentence. This Court stated in *Wallace v. Kato* that a "cause of action accrues even though the full extent of the injury is not then known or predictable. . . . Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that he had been harmed enough, placing the supposed statute of repose in the sole hands of the party seeking relief." 127 S. Ct. at 1097.

In a similar vein, this Court has held that a statute of limitations begins to run on the date that a plaintiff receives notice of a denial of a request, not on the date that the denial goes into effect. For example, in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), this Court held that the statute of limitations for a plaintiff's § 1981 suit alleging a wrongful denial of tenure occurred on the date when he became aware

that he had been denied tenure, even though "one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *See id.* at 258 (emphasis in original). Moreover, the statute of limitations began to run on the date the plaintiff knew of the denial, even though he had asked the employer to review and reconsider the decision: what mattered for purposes of the accrual of any statutory claim under § 1981 was the date he was on notice of the employer's decision. *See id.* at 261-62.

At the latest, the statute of limitations for Royal's § 1983 suit began to run when Royal received Durison's November 15, 1999 letter stating that he would not grant his request for time credit. Under this scenario, the statute of limitations for any § 1983 claims against Durison ran in late 2001, yet Royal still waited to file his complaint until 2003, long after the statute of limitations expired. Royal may have asked Durison to reconsider the decision after 1999, but those additional requests did not toll the statute of limitations, particularly given that he was aware of any time credit "problem" as of 1984. *See id.* at 261-62.

Royal also tries to convince this Court that his Eighth and Fourteenth Amendment claims have enough merit to convince this Court to ignore the *Heck* bar, let alone the other procedural bars to his suit. Petition at 28-29. In *Sample v. Diecks*, 885 F.2d 1099, 1109-11 (3d Cir. 1989), and *Moore v. Tartler*, 986 F.2d 682, 686 (3d Cir. 1993), the Third Circuit recognized that a decision not to investigate a sentence

request, or a failure to make a record of a request or refer an inmate to another official who could resolve that request might constitute deliberate indifference. However, the Third Circuit also recognized that a slow or mistaken investigation would not demonstrate deliberate indifference. *See Moore*, 986 F.2d at 686 (mistaken investigation that took five months to complete did not constitute deliberate indifference). Here, Durison personally investigated plaintiff's claim, determined that his custody records for 1983 and 1984 had been destroyed, and concluded that, regardless of the unavailability of the records, plaintiff was not entitled to the credit from 1983 and 1984 that he sought. A. at 22-23, SA. at 48. Durison explained this to plaintiff within weeks of receiving plaintiff's October 1999 request, and recommended that he get in touch with an official in the state prison system who might be better able to help him. A. at 22-23 (Durison's November Letter). When Durison received another request from Royal, he determined that Royal appeared to be entitled to three days of credit on his 1999 incarceration, and recommended that those three days of credit be applied toward his total incarceration term by the state prisons. A. at 44-45.

At base, plaintiff was and is dissatisfied with the outcome of Durison's investigation. However, that dissatisfaction does not translate into deliberate indifference on Durison's part. Nor does it translate into a case worthy of a grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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